Supreme Court No. 81083-4
Court of Appeals No. 59821-0-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

THE PIER AT LESCHI CONDOMINIUM ASSOCIATION,
Respondent/Plaintiff

v.

LESCHI CORP.,
Petitioner/Defendant

ANSWER TO BRIEF OF AMICUS CURIAE BUILDING INDUSTRY ASSOCIATION OF WASHINGTON

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I. INCORPORATION OF PRIOR ARGUMENT

Much of BIAW's brief merely repeats the arguments of appellant, Leschi Corp. as it relates to the examination of the interstate commerce connections. Respondent Pier at Leschi Owners Association has fully briefed this issue in its Brief of Appellant and will simply incorporate those arguments here.

II. ANSWER TO BRIEF OF AMICUS BIAW

A. Policy Arguments Do Not Support Application of the FAA to the Present Case.

The Building Industry Association of Washington ("BIAW") primarily emphasizes the policy behind the Federal Arbitration Act, which is to protect freely contracting parties from a local legislature or judiciary that will not enforce such agreements. BIAW begins its brief with the typical recitation that "[t]he enactment of the FAA was a clear rejection of historical judicial hostility towards arbitration."[1] This hostility was apparently present when the FAA was enacted in 1924. At the time, however, there was a rule that in equity, arbitration clauses were not enforceable. "The Arbitration Act sought to 'overcome the rule of equity, that equity will not specifically enforce any arbitration agreement.'"[2] In 1924, the rule of equity was strong and historically based:

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[1] *Amicus Curiae Brief on Behalf of Building Industry Association of Washington ("BIAW Brief")* at 5.

[2] *Southland Corp. v. Keating*, 465 U.S. 1, 13 (1984) (*citing* Hearing on S. 4214 Before a Subcomm. of the Senate Comm. On the Judiciary, 67th Cong., 4th Sess. 6 (1923) (remarks of Sen. Walsh).

> [T]he need for the law arises from . . . the jealousy of the English courts for their own jurisdiction . . . . This jealousy survived for so lon[g] a period that the principle became firmly embedded in the English common law and was adopted with it by the American courts. The Courts have felt that the precedent was too strongly fixed to be overturned without legislative enactment . . . .[3]

Clearly, the purpose behind the FAA was to enforce arbitration clauses where no opportunity to arbitrate otherwise exists.

In focusing almost exclusively upon the pro-arbitration policy of the FAA, BIAW and other amicus completely ignore the fact that at the time the present case was brought, *arbitration was provided for by the Washington Condominium Act* and was available to appellant Leschi Corp. Leschi Corp. was not suffering the unavailability of the arbitration forum, or a legislature or court hostile to arbitration. Leschi Corp. and amicus attempt to create an issue of interstate commerce where there is none in order to have the contractual one-sided arbitration agreement enforced under federal law instead of taking advantage of a fair arbitration system specifically designed for construction defect cases under Chapter 64.55 RCW.

RCW 64.34.100 provides that claims under the Condo Act may be judicially enforced, but that the recently enacted arbitration scheme contained in RCW 64.55.100-.160 counts as "judicial enforcement." The scheme is specifically tailored to construction defect cases such as this

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[3] *Id.* (*citing* H.R. Rep. No. 96. 68th Cong., 1st Sess. 1, 1-2 (1924)).

case. The statute provides for the election of arbitration by either party,[4] number of arbitrators based on the amount in controversy,[5] the qualification of the arbitrators,[6] and appeal by trial de novo.[7] The arbitration is part of a larger scheme to more efficiently handle construction defect claims. The scheme also requires a detailed case schedule,[8] mandatory mediation,[9] election to appoint neutral experts,[10]and consideration of the multi-party nature of the claims, including a method by which subcontractors and suppliers may join the arbitration.[11]

In contrast, the arbitration clause Leschi Corp. seeks to enforce is contained within its "Home Buyer's Limited Warranty," which, as a whole, is unenforceable.[12] The one-sided provisions include selection of the arbitrator:

> The arbitration shall be conducted by Construction Arbitration Services, Inc. or such other reputable arbitration service *that PWC shall select, at its sole discretion*, at the time the request for arbitration is submitted.

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[4] RCW 64.55.100(1).
[5] RCW 64.55.100(2).
[6] RCW 64.55.100(3).
[7] RCW 64.55.100(5).
[8] RCW 64.55.110.
[9] RCW 64.55.120.
[10] RCW 64.55.130.
[11] RCW 64.55.150.
[12] Under RCW 64.34.030 and *Marina Cove Condo. Owners Ass'n. v. Isabella Estates*, 109 Wn. App. 230, 34 P.3d 870 (2001), provisions of the Condo Act, including implied warranties, may not be varied by agreement or waived. Thus, the Home Buyer's Limited Warranty, which claims to limit the buyer's warranties to those specifically enumerated in the Limited Warranty, is invalid under the Condo Act. The only provision of the Limited Warranty that Leschi Corp. has sought to enforce is the arbitration clause.

CP 393. In addition, unlike the statutory scheme, Leschi Corp.'s arbitration is binding, without a right of appeal.

> The award of the arbitrator shall be final and binding and may be entered as a judgment in any court of competent jurisdiction.

Id.

Presumably, Leschi Corp.'s decision to enforce arbitration through the FAA rather than relying upon its arbitration right under Chapter 64.55 RCW is an attempt to bypass the fair statutory process for one it drafted as part of an otherwise unenforceable Home Buyer's Limited Warranty. Notably, none of the cases cited by BIAW proclaiming the supremacy of federal law reference whether arbitration was available to the parties under state law, as it is here.

In support of its policy argument, BIAW simply cites cases from Washington and other jurisdictions in support of arbitration as a general policy. These arguments carry no weight when the Washington State legislature provided for a balanced arbitration scheme particularly tailored to the case at hand.

From a policy standpoint, when the Washington legislature enacted RCW 64.55.100 through .160, it provided for statutory protection of the right to arbitration and specifically tailored the scheme to construction defect lawsuits such as the one comprising this action. If public policy were to favor one type of arbitration over another, it would make sense to apply the one for which the scheme was specifically designed. Moreover,

if the FAA applies to enforce arbitration clauses in otherwise unenforceable warranties in condominium cases, then the recently enacted statute is rendered completely moot. Thus, policy arguments in favor of applying the FAA without regard to whether the contract containing the arbitration clause evidences interstate commerce are inapplicable.

B. This Case Does Not Conflict with Congressional Intent or Supreme Court Cases.

Finally, BIAW argues that the Court of Appeals ignored congressional intent and the United States Supreme Court's record on the FAA, but fails to cite any actual congressional history or Supreme Court cases in direct conflict with the case at hand. Instead, BIAW makes the same mistake as Appellant the other amicus curiae, arguing that the Court of Appeals somehow ignored the doctrine of federal preemption. On the contrary, the Court of Appeals affirmed that federal law preempts state law *where it applies.* Whether the FAA applies depends upon the specific application of the facts to the law and is discussed at length in the Association's Brief of Respondent.

III. CONCLUSION

The rationale for application of the Federal Arbitration Act based on the local legislature's or judiciary's hesitancy to enforce arbitration clauses in equity is outdated and inapplicable. This is especially true where the Washington legislature has not shown hostility towards arbitration, but in fact provides for arbitration which has been tailored specifically for construction defect cases such as the one here. Under

these circumstances, Leschi Corp's attempt to enforce its one-sided arbitration agreement contained in an otherwise unenforceable document over the arbitration scheme provided by statute should be seen as a form of forum shopping and should not be encouraged.

Respectfully submitted this 17th day of March, 2008.

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FILED AS ATTACHMENT
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